

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-1429

B  
PAS

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA,  
Appellee,

-against-

Docket No. 75 1429

ERNESTO BATISTA,  
Appellant.

---

---

BRIEF FOR APPELLANT  
PURSUANT TO  
ANDERS v. CALIFORNIA

---

ON APPEAL FROM A JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

ROBERT G. ROXBY, ESQ.

&

ROBERT LLOYD COCBIN, ESQ.

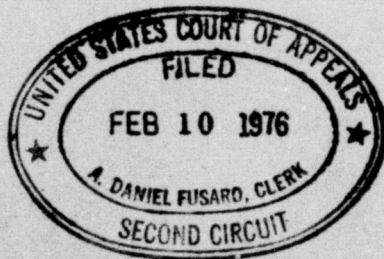
Attorneys for Appellant

Ernesto Batista

30 Christopher Street

New York, New York 10014

(212) 255-1313



To be argued by  
ROBERT LLOYD CORBIN  
&  
ROBERT G. ROXBY

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
:  
:  
:  
UNITED STATES OF AMERICA,  
:  
Appellee,  
:  
-against-  
:  
ERNESTO BATISTA,  
:  
Appellant.  
:  
-----X

Docket No. 75 1429

---

BRIEF FOR APPELLANT  
PURSUANT TO  
ANDERS v. CALIFORNIA

---

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT G. ROXBY, ESQ.  
&  
ROBERT LLOYD CORBIN, ESQ.  
Attorneys for Appellant  
ERNESTO BATISTA  
30 Christopher Street  
New York, New York 10014  
(212) 255-1313



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ERNESTO BATISTA,

Appellant.

Docket No. 75-1429

---

BRIEF FOR APPELLANT  
PURSUANT TO  
ANDERS v. CALIFORNIA

---

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there are any non-frivolous issues which can  
be presented for this Court's review.

## TABLE OF CONTENTS

Table of Cases .....	i
Question Presented .....	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement .....	2
Statement of Facts .....	2
Statement of Possible Legal Issues .....	5
Conclusion .....	8

## TABLE OF CASES

<u>McCarthy v. United States</u> , 394 U.S. 459 (1969) .....	5
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938) .....	5
<u>Irizarry v. United States</u> , 508 F. 2d 960 (2d Cir., 1974) .....	5
<u>Michel v. United States</u> , 507 F. 2d 461 (2d Cir., 1974) .....	5
<u>Williams v. New York</u> , 337 U.S. 241 (1949) .....	7
<u>Gore v. United States</u> , 357 U.S. 386 (1958) .....	7



STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered September 19, 1975. On June 26, 1975 Appellant pleaded guilty to the first count of the Indictment herein, conspiracy to distribute and possess with intent to distribute a Schedule II Narcotic drug controlled substance, in violation of Title 21 U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A), in satisfaction of the entire Indictment. In addition the government agreed not to prosecute Appellant Batista in the Eastern District of New York for any substantive crimes that he may have committed therein related to this particular conspiracy and in furtherance thereof.

This Court granted leave to appeal in forma pauperis and appointed counsel herein to represent Mr. Batista on appeal.

Statement of Facts

Appellant Batista was charged, along with Manuela Rodriguez, Jose R. Henriques and Julian Gallego, with conspiracy to distribute and possess with intent to distribute Schedule I & II Narcotic drug controlled substances (21 U.S.C.

812, 841(a)(1) & 841(b)(1)(A), Count One) and four substantive counts of distributing and possessing with intent to distribute a Schedule II Narcotic drug controlled substance (Counts Two through Five).

Appellant Batista pleaded guilty to Count One of the Indictment herein and admitted to the Court that on or about February 11, 1975 he spoke with an individual about obtaining cocaine, obtained a quantity of cocaine and sold that quantity of cocaine to an individual at 263 West End Avenue, New York, New York. Appellant Batista further admitted that on March 14, 1975 he drove to Mineola, New York with a package of cocaine in his possession (Transcript of June 26, 1975, pages 15-19). Prior to obtaining this information from Appellant Batista, the Court inquired, through a Spanish-speaking interpreter, whether Appellant desired to plead guilty and if so the extent of his understanding concerning the nature of a plea of guilty and the consequences thereof (Transcript of June 26, 1975, pages 6-14). The plea was acceptable to the Court and entered. Thereafter Appellant Batista met with probation officer James Spann who prepared the Probation Department presentence report.\* On September 4, 1975 the Appellant Batista appeared for sentencing. Appellant's attorneys reviewed the presentence report at this time, objected to certain of its contents, and requested an adjournment of

---

\*It is respectfully suggested that this Court obtain a copy of said presentence report. It was not made available to Counsel for the purpose of preparing this record.



sentence in order to refute those portions of the report to which objections were made (Transcript of September 4, 1975, pages 3-12).

Appellant Batista's attorney, Robert Llloyd Corbin sent a letter to The Honorable Lawrence W. Pierce, dated September 10, 1975 (appended hereto) challenging certain disputed items which were contained in the probation department's presentencing report. The letter further suggested that a polygraph test be administered to the Appellant Batista in accordance with an understanding arrived at between the government and Appellant's attorneys if, in the opinion of the Court, the facts surrounding the disputed items would materially affect the sentence it intended to impose.

Subsequently, on September 19, 1975 the Appellant appeared for sentencing. The Spanish-speaking interpreter was present. The Court advised that it was deleting those portions of the presentence report to which Appellant's attorneys took exception in the letter of September 10, 1975 and imposed a sentence of seven years incarceration followed by three years special probation, upon Appellant Batista.

Timely notice of appeal was filed by Appellant Batista.

## STATEMENT OF POSSIBLE LEGAL ISSUES

### 1. Voluntariness of Plea

On June 26, 1975 Appellant Batista appeared with his attorneys and informed the Court that he wished to plead guilty to Count I of the Indictment herein (Conspiracy to Violate the Narcotics Law of the United States). The Court inquired directly of Appellant whether he understood the allegations contained in the Indictment, whether he had discussed the facts regarding the Indictment with his attorneys prior thereto, whether he understood the nature of a plea of guilty, the alternatives available to him should he decide not to plead guilty, and whether the Appellant Batista in fact wished to plead guilty. Appellant Batista responded to the Court's satisfaction.

Next, the Court sought to ascertain whether the Appellant's activities provided a factual basis for the crime of conspiracy. On the basis of Appellant's responses, the Court found that a plea of guilty to the first count of the Indictment was acceptable and it was entered. It can be seen from the record that the plea was voluntarily given. McCarthy v. United States, 394 U.S. 459 (1969); Johnson v. Zerbst, 304 U.S. 458, at 464 (1938); Irizarry v. United States, 508 F. 2d 960 (2d Cir. 1974); Michel v. United States, 507 F. 2d 461 (2d Cir. 1974).



## 2. Propriety of Contents of Presentence Report

When Appellant Batista appeared for sentencing on September 4, 1975 his attorneys objected to portions of the Probation Department's presentence report. At the very opening of the report, under the heading "Government's Version" there were allegations by agents of the D.E.A. which claimed that Appellant was involved in criminal activity which extended beyond the scope of the Indictment. Appellant's position was that such allegations were without factual basis, inflammatory, prejudicial and not subject to the rules of evidence. This review of the government's file inevitably must contain, in some part at least, conjecture, supposition, hearsay and innuendo. The Court indicated that it did have wide discretion and could look to a variety of sources in order to gain information and insight into the Appellant Batista's participation in criminal activity. Appellant requested and received a two-week adjournment. On September 10, 1975 Appellant's attorney, Robert Lloyd Corbin, wrote the Hon. Lawrence W. Pierce. Mr. Corbin objected to the continued inclusion in the presentence report of four (4) specific items.

On the adjourned date, September 19, 1975, Judge Pierce acknowledged receipt of Mr. Corbin's letter and indicated that none of the disputed items would be considered by the Court in imposing its sentence (Transcript of September 19, 1976, page 2). The Court felt that a further

adjournment was unnecessary and accordingly imposed sentence upon Appellant Batista.

Counsel believe that the Court gave Appellant Battista an opportunity to refute incorrect statements contained in the presentence report. Moreover, it deleted those portions of the presentence report which were objected to by Appellant's attorneys. It is well settled that judges may consider factual background information about a defendant concerning his criminal activities, Williams v. New York, 337 U.S. 241, pages 246-247 (1949).

### 3.      Severity of Sentence

The Court's sentence imposed upon Appellant Batista was within the limits proscribed by statute. The period of incarceration imposed herein was a matter of judicial discretion. This Court has no power to review that sentence. Gore v. United States, 357 U.S. 386, 393 (1958).



CONCLUSION

For the foregoing reasons, there are no non-frivolous issues which may be raised on appeal for this Court's review. Accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1967), should be granted and Robert G. Roxby, Esq. and Robert Lloyd Corbin, Esq. relieved as Mr. Batista's counsel on appeal.

Respectfully submitted,

ROBERT G. ROXBY, ESQ.

&  
ROBERT LLOYD CORBIN, ESQ.  
Attorneys for Appellant  
ERNESTO BATISTA  
30 Christopher Street  
New York, New York 10014  
(212) 255-1313

February 7, 1976





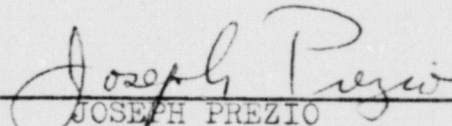
Affidavit of Service

Joseph Prezio, being duly sworn, deposes and says:  
That he is over the age of 18 years and not a party to  
this action and resides at 30 Christopher Street, New  
York, N.Y. and that on February 9, 1976 he deposited in  
a securely enclosed postpaid envelope at the General  
Post Office, 33rd St. and 8th Avenue, New York, N.Y. one  
original and seven copies of the enclosed Brief and  
Appendix thereto to the Clerk of the Court of Appeals at  
the address set forth below and further, two copies of the  
same, addressed to the United States Attorney at the Address  
set forth below, and one copy of the same to the Appellant,  
Ernesto Batista at the address set forth below for him:

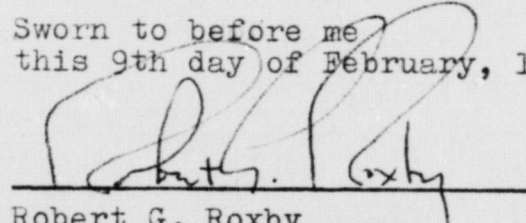
The Honorable A. Daniel Fusaro  
Clerk  
United States Court of Appeals  
for the Second Circuit  
1702 United States Court House  
Foley Square  
New York, New York 10007

The Honorable Paul J. Curran  
United States Attorney  
Southern District of New York  
One St. Andrews Plaza  
New York, New York 10007

Mr. Ernesto Batista  
United States Penitentiary  
Lewisburg, Penn. 17837.

  
JOSEPH PREZIO

Sworn to before me  
this 9th day of February, 1976

  
Robert G. Roxby  
Notary Public  
NOTARY PUBLIC, State of New York  
No. 31-3334175  
Qualified in New York County  
Cert. Filed in Bronx County  
Commission Expires March 30, 1976